No. 80-983

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES STEEL CORPORATION,
PETITIONER

v.

BRUCE W. CHRIST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

LEONARD SCHAITMAN
JOHN C. HOYLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-983

UNITED STATES STEEL CORPORATION,
PETITIONER

v.

BRUCE W. CHRIST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a subordinate employee of a federal agency can be compelled to comply with a subpoena duces tecum where the responsible agency official, pursuant to federal regulation, has refused to authorize the employee to produce the requested information and that official has not been served with legal process.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Boske v. *Comingore*, 177 U.S. 459 ..... 4, 5, 6

Cates v. *LTV Aerospace Corp.*, 480 F. 2d 620 8

Lincoln National Bank v. *Lampe*, 421 F. Supp. 346 6

Marcoux v. *Mid-State Livestock*, 66 F.R.D. 573 6

NLRB v. *Capitol Fish Co.*, 294 F. 2d 868 7

Saunders v. *Great Western Sugar Co.*, 396 F. 2d 794 ..... 3, 6, 8

Swanner v. *United States*, 406 F. 2d 716 7

United States v. *Allen*, 554 F. 2d 398 6

United States v. *Reynolds*, 345 U.S. 1 7

United States ex rel. Touhy v. *Ragen*, 340 U.S. 462 ..... 3, 4, 5

PREVIOUS PAGE WAS BLANK

Page

Statutes and regulations:

Rev. Stat. 161 5
15 U.S.C. 271 *et seq.* 6
15 U.S.C. 277 6
15 C.F.R. Part 275 3
15 C.F.R. 275.2 ..... 2, 3, 4, 6, 8
15 C.F.R 275.4(a) 2

Miscellaneous:

Department of Commerce Organization Order 30-2A (Apr. 29, 1975) 6

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1980, and a petition for rehearing was denied on September 11, 1980 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on December 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Dr. Bruce W. Christ is a staff metallurgist employed in the Fracture and Deformation Division, Center for Material Science, National Measurements Laboratory, National Bureau of Standards (NBS) in Boulder, Colorado (Affidavit of Bruce W. Christ at 1) (hereinafter "Christ Aff."). He prepared a report entitled "Analysis Of The Pneumatic Burst Of A Large Seamless Steel Pressure Vessel In Natural Gas Service" for the Office of Hazardous Materials Regulation of the Department of Transportation following the explosion on October 27, 1977, of a large steel cylinder manufactured by petitioner United States Steel Corporation (*ibid.*). The explosion caused two deaths, injuries to four others, and property damage (Pet. App. 3a). The purpose of the report, which was issued in March 1979, was to provide data and advice to the Department of Transportation for use in possible rulemaking regarding the construction and handling of steel cylinders (Christ Aff. at 2).

Dr. Christ's report was admitted into evidence in a suit in the United States District Court for the Western District of Kentucky involving the liability of petitioner and others for the deaths, injuries, and property damage resulting from the explosion (Pet. App. 4a).[1] (The report was admitted subject

[1]The federal government is not a party to this litigation. Initially, wrongful death and personal injury suits were filed against

to dispute by the parties and cross-examination at trial (Affidavit of Carl A. Heinlein at 4)). Thereafter, petitioner's counsel submitted a written request to the Chief Counsel, NBS Office of Legal Adviser, seeking authorization to depose Dr. Christ in order to explore the "foundations for [Dr. Christ's] findings and conclusions" (Heinlein Aff. at 3). Such a request is required by NBS regulations, which prohibit an employee from giving testimony or producing information acquired as a result of his official duties in a case in which the government is not a party without prior written authorization of the Legal Adviser. 15 C.F.R. 275.2. Under the regulations, a request to the Legal Adviser for such authorization must include, *inter alia*, "the reasons for desiring and the intended use of the testimony, a general summary of the testimony desired, and a showing that (1) the desired testimony is not reasonably available from other sources * * * and (2) no NBS record in certified form * * * could be introduced in evidence in lieu of the testimony or other appearance requested." 15 C.F.R. 275.4(a).

The NBS Legal Adviser denied petitioner's request because there was no showing that the desired information was not reasonably available from other sources. The Legal Adviser further informed petitioner that "the physical material which Dr. Christ examined is available for examination by you and experts hired by you, and these experts will be able to draw their own conclusions on the basis of their examination" (Letter to John R. McCall, dated Nov. 2, 1979).

Dr. Christ was subsequently served with a subpoena duces tecum on January 8, 1980.[2] It was then stipulated that

---

petitioner. Thereafter, petitioner filed suit against other third parties for contribution and indemnity for any amounts it has paid for settlements or may have to pay as a result of lawsuits arising out of the accident (Pet. App. 4a). This suit is still pending.

[2]The subpoena commanded Dr. Christ to appear for the taking of a deposition and to bring with him "for examination and copying all

if Dr. Christ were to appear at the deposition in response to the subpoena he would decline to testify, on the authority of 15 C.F.R. Part 275, and that, accordingly, Dr. Christ need not appear at the scheduled deposition or produce any documents.

Petitioner then filed a motion to compel compliance with the subpoena duces tecum in the United States District Court for the District of Colorado, the district in which Dr. Christ resides. Dr. Christ opposed the motion, relying on the prohibition in 15 C.F.R. 275.2 against compliance without approval of the NBS Legal Adviser. The district court granted petitioner's motion on the ground that there was no statutory authority for the regulation (Pet. App. 3a-11a).

The court of appeals reversed, holding (Pet. App. 2a) that "the District Court erred in enforcing the subpoena" and stating that this case is controlled by *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), and *Saunders* v. *Great Western Sugar Co.*, 396 F. 2d 794 (10th Cir. 1968). The court of appeals remanded the cause to the district court "with directions to recall the subpoena and dismiss all proceedings with regard thereto" (Pet. App. 2a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court or of any other court of appeals. Further review is therefore unwarranted.

---

books, papers, documents, reports, memoranda, data, tests, analyses, publications, records or other written materials in his possession or in the possession, custody or control of the Department of Transportation, Materials Transportation Bureau relating to or concerning Report No. DOT/MTB/OHMR/78-4 dated December 4, 1978, and all investigations, tests and analyses concerning the accident which occurred at Shrewsbury, Kentucky on October 27, 1977, or in the possession, custody or control of the U.S. Department of Commerce, National Bureau of Standards concerning said Report and accident."

1. Petitioner sought to subpoena documents and compel testimony from Dr. Christ, a government employee, in connection with a case to which the government is not a party. The documents are government records and the testimony would pertain to Dr. Christ's functions as a government employee. Dr. Christ declined to comply with the subpoena pursuant to the orders of the NBS Legal Adviser—the agency official responsible, under applicable agency regulations, for making such decisions. The question decided by the court of appeals was not whether the Legal Adviser was correct in his decision not to permit the employee to comply with the subpoena, *e.g.*, whether the refusal was grounded on any valid claim of privilege. Rather, the court below resolved two quite different questions: whether the regulations on which Dr. Christ relied in declining to comply with the subpoena are valid, and whether petitioner accordingly should have challenged the Legal Adviser's ruling in a proper proceeding against the agency head or the Legal Adviser rather than in an action against the subordinate, Dr. Christ, placing him in jeopardy of contempt for declining to disobey agency regulations. Both of these questions were correctly decided.

Housekeeping regulations similar to 15 C.F.R. 275.2, centralizing in a responsible agency official the authority to decide on behalf of the agency whether a subpoena should be challenged or complied with, have been upheld by this Court in *Boske* v. *Comingore*, 177 U.S. 459 (1900), and *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951). *Boske* was a hab eas corpus proceeding for the release from custody of an Internal Revenue Service employee jailed for contempt on the ground of his refusal, in compliance with agency regulations, to supply tax records in response to a subpoena. The ultimate question was the validity of the regulations pursuant to which the employee refused to comply with the subpoena—regulations providing, *inter alia*, that subpoenaed tax records would be furnished "to

the court only and *on a rule of the court upon the Secretary of the Treasury* requesting the same." *Boske* v. *Comingore, supra*, 177 U.S. at 461 (emphasis supplied). This Court held that the test for the validity of such a regulation was whether it was "plainly and palpably inconsistent with law" and whether those challenging the regulation had made "its invalidity so manifest that the court has no choice except to hold that the [official who promulgated it] exceeded his authority and employed means that are not appropriate to the end specified in the act of Congress."[3] The Court determined that the regulation clearly met that test (*id.* at 469-470):

> Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to records * * * except as might be directed by the Secretary of the Treasury. * * * [G]reat confusion might arise in the business of the Department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates. At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress.

Similarly, in *United States ex rel. Touhy* v. *Ragen, supra*, this Court upheld a regulation requiring employees of the Department of Justice to obtain approval of the Attorney General before complying with a subpoena duces tecum seeking disclosure of departmental files and documents. The Court recognized that the issue was not whether the

---

[3]The regulation was issued pursuant to Rev. Stat. 161, which authorized each agency head "to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution of its business, and the custody, use and preservation of the records, papers, and property appertaining to it."

Attorney General ultimately had authority to resist disclosure, but whether the head of the department could validly withdraw from his subordinates the power to release documents or information obtained in the course of official duties. Relying on *Boske* v. *Comingore*, *supra*, the Court rejected the contention that such a regulation invades the authority of the courts to determine the admissibility of evidence (340 U.S. at 468-469).

In holding that the district court erred in compelling enforcement of the subpoena directed to Dr. Christ, the court of appeals simply followed *Boske* and *Touhy* and its own earlier decision in *Saunders* v. *Great Western Sugar Co.*, 396 F. 2d 794 (10th Cir. 1968), in which it had set aside a district court order directing local officials of the Small Business Administration to comply with a subpoena duces tecum where their refusal was grounded on an agency regulation prohibiting disclosure in the absence of authorization by the SBA's Assistant Administrator for Administration. See also *United States* v. *Allen*, 554 F. 2d 398, 406 (10th Cir. 1977), affirming the validity of a Department of Justice regulation similar to that at issue in *Touhy*. Accord: *Lincoln National Bank* v. *Lampe*, 421 F. Supp. 346 (N.D. Ill. 1976) (Department of Justice regulations); *Marcoux* v. *Mid-States Livestock*, 66 F.R.D. 573 (W.D. Mo. 1975) (regulations of the Comptroller of the Currency). The regulation at issue here, 15 C.F.R. 275.2, was properly authorized[4] and, like the regulations upheld in *Boske* and its

---

[4]The regulation was promulgated under the authority of 15 U.S.C. 277, which provides:

> The Secretary of Commerce shall, from time to time, make regulations regarding the payment of fees, the limits of tolerance to be attained in standards, submitted for verification, the sealing of standards, the disbursement and receipt of moneys, and such other matters as he may deem necessary for carrying this chapter into effect.

Department of Commerce Organization Order 30-2A, dated Apr. 29,

progeny, serves a useful administrative purpose without withdrawing from the courts the ultimate authority of deciding whether any particular refusal to disclose agency records or permit testimony related to an agency function is warranted.

2. Petitioner errs in contending (Pet. 8-9) that the decision below conflicts with *United States* v. *Reynolds*, 345 U.S. 1 (1953), and with the decisions of the Fifth Circuit in *NLRB* v. *Capitol Fish Co.*, 294 F. 2d 868 (1961), and *Swanner* v. *United States*, 406 F. 2d 716 (1969). In *Reynolds*, this Court upheld the claim of the Secretary of the Air Force that certain evidence was privileged from disclosure because it contained military secrets. The issue was not whether a subordinate employee could be compelled to comply with a subpoena duces tecum, but whether the highest official of the Air Force had properly invoked the state secrets privilege.

It is true, as petitioner suggests, that *Reynolds*, *Capitol Fish*, and *Swanner* do not hold that legal process must be served on the head of an agency before the validity of the agency's decision not to authorize disclosure can be adjudicated. There was no need to employ such a procedure in those cases, however: each was an action to which the government was a party, not a subpoena enforcement proceeding against an agency subordinate. Indeed, in *Capitol Fish*, the case on which petitioner principally relies (Pet. 8-9), the decision not to permit an agency attorney to testify was made by the General Counsel of the NLRB, the officer responsible for prosecuting the unfair labor practice proceeding in which the testimony was sought; and the party

---

1975, delegates to the NBS Director the authority to perform all functions defined in Chapter 7 of Title 15 (15 U.S.C. 271 *et seq.*) with certain exceptions not here relevant. Section 3.02a of the Order expressly confers authority to issue regulations.

seeking the testimony was the respondent employer whom the General Counsel was prosecuting. The Fifth Circuit reviewed the propriety of the General Counsel's nondisclosure decision in the course of deciding whether to enforce the NLRB's unfair labor practice order against the employer.

The NBS Director and his Legal Adviser have no such connection with either the private lawsuit in Kentucky for which petitioner seeks the documents and testimony in question or the subpoena enforcement action against Dr. Christ in Colorado.[5] Thus, petitioner's proper course is to obtain service of process on the NBS Director or the Legal Adviser. See *Saunders* v. *Great Western Sugar Co.*, *supra*, 396 F. 2d at 795; see also *Cates* v. *LTV Aerospace Corp.*, 480 F. 2d 620, 623 (5th Cir. 1973). Once the responsible agency official is properly before the district court, the question whether the nondisclosure decision was proper will be fully reviewable. The delay in obtaining such review thus far is the result of petitioner's failure to follow this settled procedure at the outset.

---

[5]Had NBS been a party to the Kentucky suit, the regulation at issue here, 15 C.F.R. 275.2, would not have been invoked, because it does not apply to cases in which the government is a named party.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

LEONARD SCHAITMAN
JOHN C. HOYLE
Attorneys

FEBRUARY 1981